

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE)	
)	
GERALD PATRICK RUETH and)	Case No. 99-00325
CHALYSE RUETH,)	
dba Rueth Farms,)	
)	
)	
Debtors.)	MEMORANDUM OF DECISION
)	
_____)	

HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

Richard D. Himberger, Boise, Idaho, Counsel for Debtors.

Gary C. Thomas, Emmett, Idaho, Agricultural Consultant for Debtors.

Jeffrey G. Howe, Assistant U.S. Trustee, Boise, Idaho, for the U.S. Trustee.

Ronald Schoen, Payette, Idaho, Trustee.

INTRODUCTION

Before the Court are applications for allowance of compensation of the Debtors' professionals in this confirmed chapter 12 proceeding, following hearing held March 13.

Richard Himberger (“Counsel”) seeks \$28,788.75 in fees¹ and \$968.82 in costs for a total of \$29,757.57. Gary Thomas (“Consultant”) seeks \$3,860.00 in fees and \$772.70 in costs.²

Notice of the requests was provided all creditors and parties in interest as required by the Rules. No objections were filed. At hearing, only the applicants, the U. S. Trustee (“UST”) and the chapter 12 Trustee (“Trustee”) appeared. No objections were voiced, though the UST did indicate that some discussions between the UST and Counsel will lead to future changes and improvements to Counsel’s application format and detail.

The Court took the matter under advisement in order to evaluate the applications in detail because, even in the absence of objection, it has an independent duty to review fees and costs requested by professionals. *In re Schwandt*, 95 I.B.C.R. 268, 268-69 (Bankr. D. Idaho 1995). *See also, In re Dale’s Crane, Inc.*, 99.1 I.B.C.R. 8 (Bankr. D. Idaho 1999) citing *Lobel & Opera v. United States Trustee (In re Auto Parts Club)*, 211 B.R. 29, 33 (9th Cir. BAP 1997). Even if such review were only discretionary, the sheer magnitude of the compensation here sought impels it.

¹ This consists of 224.55 hours at \$125.00 per hour (\$28,068.75) for Mr. Himberger, plus 12.00 hours of paraprofessional time at \$60.00 per hour (\$721.00).

² The Court calculates that \$668.50 of the \$772.70 in “costs” is actually travel time charged at \$35.00 per hour, which is compensation rather than a cost or expense.

DISCUSSION

The standards applicable to such matters have often been stated, and need not be repeated at great length here.³ In short, the applicants bear the burdens of proof and persuasion as to the reasonableness and allowability of the fees and costs sought. They must have complied with all statutory provisions and rules, and violation of any of such requirements can lead to reduction or denial of compensation. The requested compensation is measured under the specific criteria of § 330 as well as that announced in a wealth of precedent. Among other things, this case law establishes the primacy of the “lodestar” analysis, which calculates a presumptively allowable figure by multiplying the actual time spent on reasonable and necessary services by an appropriate hourly rate.⁴

Counsel’s application

This case was filed on February 17, 1999 and a chapter 12 plan was confirmed on August 24, 1999. The course of events did not run smoothly. There was a significant amount of dispute. This surfeit of litigation cuts both ways. On the one hand, it leads to a higher allowable fee because the actual demands on Counsel were greater. On the other hand, it is the Court’s distinct impression from having presided over that litigation that some of it was not

³ See generally, *In re For-Rose Plumbing, Inc.*, 99.2 I.B.C.R. 69, 71 (Bankr. D. Idaho 1999); *Dale’s Crane*, 99.1 I.B.C.R. at 8-9.

⁴ See, *Digesti & Peck v. Kitchen Factors, Inc.*, (*In re Kitchen Factors, Inc.*), 143 B.R. 560, 562 (9th Cir. BAP 1992).

absolutely necessary and reflected the relative inexperience of Counsel in matters of this sort. More seasoned counsel may have been able to reach the ultimate results obtained, including agreements and accommodations as well as litigated victories, without the same degree of effort.

The Court is satisfied that the time reported by Counsel was actually spent, and accepts his representation that a 20% reduction in time (to adjust for his learning curve) already has been made. It further appears that administrative and similar tasks have, for the most part, been omitted from the charges asserted. Yet the overall bill in this chapter 12 reorganization is still one of the highest reviewed by the Court.

Legal charges are a function of both time spent and rate charged. The “reasonable” amount of time devoted to actual services is dependent upon experience. Thus, what would not necessarily be a reasonable expenditure of effort by an experienced practitioner may yet be reasonable for a less experienced lawyer. But, by the same token, rates are (or should be) reflective of that different experience. The higher rate of the expert recognizes, among other things, greater efficiency.

The Court has determined, from the totality of the record before it, that

parsing the time entries spent set forth in the Application in order to further address their “reasonableness” would not be appropriate or beneficial. The Court is convinced that the issue lies instead with use of a proposed hourly rate which is higher than what is justified by Counsel’s experience and the marketplace.

Counsel acknowledged his relative lack of experience in chapter 12 cases from the outset of this case. He clearly, from the Court’s observation, worked diligently throughout the case. But the efficiency with which he delivered services was impacted by his lack of experience.⁵

Is Counsel’s proposed \$125.00 per hour rate fair and reasonable under all the circumstances? The Court took a brief tour of some recent chapter 12 filings throughout the District to ascertain the range of rates being charged for like work, and found rates for chapter 12 debtors’ counsel ranging from \$85.00 to \$135.00 per hour. In general, the lawyers involved are well known in bankruptcy circles,

⁵ To be sure, Counsel is neither inexperienced nor untalented as a lawyer. He acquitted himself well. The comments of the Court go only to the relative lack of specialized experience in this area and how that impacts the rate which he can charge for his services.

and have a greater degree of chapter 12 experience than Counsel here.⁶

The Court is quite sensitive to the fact that the UST, Trustee, creditors and the debtors themselves have voiced no objection to Counsel's request. Furthermore, Counsel has written off 20% (some \$5,000.00) in an independent and voluntary (and commendable) exercise of his billing judgment. Still, if the review function imposed on the Court is to have any real purpose or meaning, the Court cannot ignore the fact that the rate suggested by Counsel is one reflective of more experienced chapter 12 attorneys.

For the foregoing reasons, the Court will apply a rate of \$110.00 per hour to all Counsel's time entries set forth in his application. His paralegal's charges of \$720.00 will be allowed. The entirety of costs claimed, of \$968.82, will be

⁶ The Court reviewed applications for approval of employment of debtors' counsel in several cases through the RACER system. It found the following illustrative cases, attorneys and rates:

In re Phelps, Case No. 99-41577 and *In re Jamison*, Case No. 99-03399 (Marc Tanner, \$85.00); *In re Brown*, Case No. 99-02229 and *In re Koppen*, case No. 98-01891 (Lary Walker, \$115.00); *In re Atagi*, Case No. 99-2513 and *In re Lemos*, Case No. 98-00551 (Howard Foley, \$125.00); *In re Schlepp Ranch*, Case No. 98-20884 (Bruce Anderson, \$125.00; also Ford Elsaesser, \$135.00 and Doug Marks, \$100.00); *In re Duncan*, Case No. 00-40131 and *In re Schwartz*, Case No. 99-41595 (Brent Robinson, \$130.00); *In re Anderson*, Case No. 99-41772 (Bart Davis, \$135.00).

allowed.⁷

Consultant's application

The requested compensation of the Consultant has been reviewed, and will be allowed as prayed. In passing, however, the Court admonishes the Consultant (and Counsel, for those cases where he again engages the assistance of this or another consultant) to take care that (1) services provided by the debtors' attorneys and the Consultant are not being duplicated; (2) billing judgment is exercised when both attorney and consultant seek to charge for discussions between themselves; and (3) "travel" time is plainly disclosed and appropriately charged.⁸ These are areas with potential for abuse, and will be closely reviewed by the Court.

⁷ Some aspects of Counsel's application were problematic and concerned the Court. However, the UST indicated that discussions with Counsel satisfactorily addressed changes which would be advisable or required in future applications. The Court will decline any further comment on such matters on the assumption that Counsel has taken the opportunity to learn from the UST's input and its restrained approach in this case, and will remedy such problems in the future.

⁸ See, e.g., *In re Good*, 97.2 I.B.C.R. 42, 43 (Bankr. D. Idaho 1997); *In re Leed Corporation*, 97.3 I.B.C.R. 95, 96 (Bankr. D. Idaho 1997). It appears from the Consultant's time entries that his travel time was billed at \$35.00 per hour, and not \$60.00 per hour. While this is indeed a "reduced" rate as required by *Good*, the Court believes an applicant should justify anything higher than one-half the normal rate. The Consultant should also take care in future applications to ensure that such charges are properly identified as compensation rather than expense, to provide details concerning such charges, to plainly disclose the method and rate of charge, and to segregate these from other services for which compensation is sought.

CONCLUSION

Counsel shall be allowed compensation of \$24,700.50 (224.55 hours at \$110.00 per hour), plus paralegal compensation of \$720.00, and all costs claimed of \$968.82, for a total allowance of \$26,389.32. The Consultant is allowed compensation of \$3,860.00 and costs of \$772.70, for a total of \$4,632.70. Such amounts are entitled to treatment as administrative expenses, and shall be paid as established by the confirmed chapter 12 plan. An Order will be entered consistent with the foregoing.

Dated this 21st day of March, 2000.